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No. 589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, NEW ORLEANS TELEVISION CORPORATION, CAPITOL BROADCASTING COMPANY and AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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April 1963

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ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC., *Petitioner*,

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FEDERAL COMMUNICATIONS COMMISSION, NEW ORLEANS TELEVISION CORPORATION, CAPITOL BROADCASTING COMPANY and AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

The briefs in opposition of the Federal Communications Commission and New Orleans Television Corporation largely reiterate arguments on the merits that were made to the Court of Appeals and were therefore anticipated in our petition.

Neither brief in opposition disputes what cannot be disputed: that the ruling of the court below will govern intervention rights in all appeals from Federal Communications Commission licensing proceedings. The Commission says (Br. in Opp., p. 13) that the fact that only appeals from its licensing actions are involved

points up the lack of general importance of the question presented here." But this overlooks the fact that such appeals are a major part of the judicial proceedings arising from Commission action, and procedural questions relating to them have themselves a general importance going far beyond the instant case.

Somewhat related is New Orleans' statement (Br. in Opp., pp. 6-7) that Section 402(c) of the Communications Act "has been in effect for thirty-three years without challenge," and that "there is no great precedent potential" in the decision below "since it merely represents an application of existing law." So far as we are aware, the construction of Section 402(c) that New Orleans regards as being well settled was first adopted by the court below in an order entered two weeks before its order in this case. See Order of Nov. 1, 1962, in *Rhode Island Television Corp.* v. *FCC*, D. C. Cir. No. 17,255, dismissing notice of intention to intervene filed by Capitol Television Corporation. Theretofore such a rule was unknown. Thus, the question is novel as well as important to all future litigants in appeals from Commission action.

Three other points raised in the briefs in opposition merit a brief rejoinder.

1. The Commission states (Br. in Opp., pp. 8-9) that petitioner is not prejudiced by the order below because it has been allowed to file a brief *amicus curiae*. The contention begs the question by assuming that petitioner did not have a sufficient interest to justify intervention as a party. Appearance as an *amicus* is not the equivalent of participation as a party. As we pointed out in our petition, as *amicus curiae* petitioner will not have the right to file a reply brief, to participate in oral argument or to seek or to participate in

any further review in this Court. In *FCC* v. *NBC (KOA)*, 319 U.S. 239, 246, holding that intervention should have been allowed in a Commission proceeding, this Court said that it was "beside the point to discuss . . . the privileges accorded by the Commission to one denied intervention"—including in that case both the filing of a brief *amicus curiae* and the presentation of oral argument—since the respondent in that case "was entitled to participate in the proceedings."

2. The Commission says (Br. in Opp., pp. 14-15) that when the Congress in 1952 deleted from what is now Section 402(d) of the Communications Act the phrase "and to have a right to intervene . . ." it made a substantial change in the definition of persons to whom notice of the filing and pendency of an appeal from a licensing order must be given by the Commission. According to the Commission, the 1952 change, which was apparently not regarded as consequential by the congressional committees (see Pet., p. 19), expanded the notice requirement to include not only those who were entitled to intervene "but also other persons who evidenced an interest before the Commission which would warrant advising them of the further course of the proceedings." There was admittedly no substantial change in what is now Section 402(c), dealing with intervention, which the Commission argues has always meant that only those who would be aggrieved or adversely affected by reversal or modification of the Commission's order had a right to intervene. Thus, if the Commission were correct, it would be expected that prior to 1952 notice under what is now Section 402(d) was given only to the limited category of persons that on its view were then and are now entitled to intervene. In fact this was not so. Examina-

tion of the Commission's dockets in some multi-party licensing cases in which appeals were taken before the 1952 change indicates that the statutory notice was given to all parties, as it apparently is now, and not merely to the party who alone would be aggrieved or adversely affected by reversal or modification of the order.[1] This is further support for petitioner's view that the Congress in 1952 was simply deleting a redundancy in Section 402(d). It is also further support for petitioner's view that the right to intervene was not intended by the Congress nor interpreted by the Commission to be limited only to those who would be aggrieved or adversely affected by reversal or modification of the order under appeal.

3. The Commission urges (Br. in Opp., pp. 14-16) that the use of the phrase "interested person" in other related statutory provisions does not bear upon its meaning as used in Section 402(e) of the Communications Act. Among other things, the Commission cites the *Attorney General's Manual on the Administrative Procedure Act*, which says at page 70 with respect to Section 6(d) of the Administrative Procedure Act that in formal proceedings interested persons are only those who are "parties" within the meaning of Section 2(b) of that act. It goes on to contend that petitioner was not a party within the meaning of Section 2(b) and therefore not an interested person under Section 6(d). But Section 2(b) is quite to the contrary. According to Section 2(b), petitioner was a party to the Commission proceeding from which the appeal to the Court

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[1] *E.g.*, Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951) (FCC Docket Nos. 7694, 7817, 7962); Bay State Beacon, Inc. v. FCC, 171 F.2d 826 (D.C. Cir. 1948) (FCC Docket No. 6845). In Easton Publishing Co. v. FCC, 175 F.2d 344 (D.C. Cir. 1949), the Commission gave statutory notice to the losing parties below (FCC Docket No. 7179), and one such party intervened in the Court of Appeals *on the side of the appellant*.

of Appeals was taken. Section 2(b) defines a party as "any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding," and it then goes on to provide that nothing in the statute "shall be construed to prevent an agency from admitting any person or agency *as a party* for limited purposes." 5 U.S.C. § 1001(b). (Emphasis added). This is the very least that the Commission did when it allowed, over the objection of New Orleans, "the limited participation sought by" this petitioner in its proceeding.[2]

The question presented is substantial as well as important, and the petition for certiorari should be granted.

Respectfully submitted,

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[2] Contrary to the implication of both New Orleans (Br. in Opp., p. 10) and the Commission (Br. in Opp., p. 16), petitioner's participation in the Commission proceeding was allowed not only because of the Commission's Rule 1.361(a), 47 C.F.R. § 1.361(a), but also because, as recited by the Commission, it was one of the "interested parties" the Commission had previously stated would be allowed to respond to New Orleans' application and because of the intimate inter-relationship between the omnibus rule making case, Docket No. 13340, in which petitioner was unquestionably a party, and the proceeding on New Orleans' application. (Pet. App., p. 3a).